

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLEE**

74-1370

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To be argued by
DON D. BUCHWALD

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 74-1370

UNITED STATES OF AMERICA,

Appellee,

—v.—

CANDIDO MAYET and MARIE AGUILAR,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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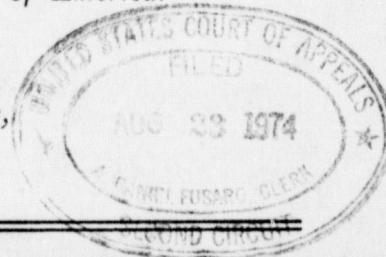




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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Candido Mayet and Marie Aguilar appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on February 1, 1974, after a five-day trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury.

Indictment 73 Cr. 702, filed July 19, 1973, charged Mayet and Aguilar and two other defendants—Harry Shapiro and Robert Kelly*—in Count One with conspiring to distribute cocaine (Title 21, United States Code, Section 846). Mayet, Aguilar and Shapiro were also charged in Count Two with distributing and possessing with intent

* Prior to trial, Shapiro and Kelly pleaded guilty to the conspiracy count, and they testified as government witnesses at trial.

to distribute approximately three ounces of cocaine on July 9, 1973 (Title 21, United States Code, Section 841(a)(1)).

Trial commenced on December 5, 1973 and concluded on December 11, 1973 when the jury found Mayet and Aguilar guilty on both counts.*

On February 1, 1974, Judge Wyatt committed both defendants under the Youth Corrections Act, Title 18, United States Code, Section 5010(b).

Aguilar is presently serving her sentence. Mayet is at liberty pending this appeal.

Statement of Facts

Government's Case

The evidence established that Mayet operated a shoe factory ("Fiesta") and a retail shoe store ("Puma") in New Jersey (Tr. 182-183).**

In May, 1973 Mayet approached one of his shoe salesman, Harry Shapiro, and told Shapiro he could profit if he knew any cocaine buyers. Mayet told Shapiro that he could supply kilos of cocaine (Tr. 184-185). Shapiro had on previous occasions sniffed cocaine which Mayet had supplied (Tr. 302).

Shapiro advised his roommate, Bobby Kelly, of Mayet's offer, offered to split his own profits with Kelly, and asked Kelly to let him know about anyone who wanted to buy cocaine so that he could advise Mayet. Kelly had met Mayet through Shapiro (Tr. 186-187).

* After the verdict, Aguilar entered a plea of guilty to a Second Offender Information which had been filed prior to the trial.

** Page references with the prefix "Tr." refer to the trial transcript. "GX" refer to Government Exhibits.

In early June, 1973, Kelly, during the course of his work as a clothing salesman (Tr. 187), offered to sell cocaine to Michael Lorber, the proprietor of a 17th floor sportswear showroom at 1411 Broadway in Manhattan (Tr. 33-34). Kelly told Lorber that he had a "Cuban connection" for the cocaine (Tr. 33-34) and a week later arranged with Lorber to deliver a sample and advise Lorber of the prices (Tr. 35-36).

Lorber told Kelly that he had a partner (Roth) who was interested, and Kelly so advised Shapiro, who in turn advised Mayet (Tr. 189). Shapiro gave Kelly a price list which was delivered to Lorber and told Kelly he would obtain a sample from Mayet (Tr. 38-40, 190-191).

Unbeknownst to Kelly, Lorber had previously been arrested with Roth on federal charges of possession of amphetamines with intent to distribute (Tr. 50-51, 56, 65-66, 108). Lorber and Roth had been invited to cooperate with the Government and were awaiting sentence (A. 89-90, 395-396, 425-426).*

In mid-June, 1973 Mayet brought several small packets of cocaine to Shapiro's apartment which he asked Shapiro to sell (Tr. 193-194). Shapiro took only one of the packets which he later gave to Kelly for delivery to Lorber (Tr. 196). Kelly brought the sample, consisting of a little less than a spoon of cocaine, to Lorber at the latter's showroom (Tr. 36, 84). It was at this point that Lorber reported the events to agents of the Drug Enforcement Administration, who told him to arrange a larger purchase from Shapiro (Tr. 59-60, 62, 75, 92).

* On August 18, 1973, Lorber was sentenced by Judge Tenney to two years imprisonment (Tr. 50-51, 65). On the same day, Roth was sentenced by Judge Tenney to imprisonment for a year and a day (Tr. 90, 385).

After Kelly failed to show up on June 25, 1973 for a pre-arranged meeting with Roth at Lorber's showroom (Tr. 41, 368), Lorber called Kelly and during the course of the conversation spoke with Shapiro (Tr. 41-42). In that and subsequent telephone conversations, Lorber agreed henceforth to deal directly with Shapiro, and the two agreed on a price of \$750 per ounce for a three ounce purchase of cocaine by Lorber's partner (Tr. 42-44, 197,198).

Shapiro arranged with Lorber to meet Roth at the showroom. Unable to reach Roth, Lorber induced Susan Marcus (a casual business acquaintance who Lorber had spoken with only on the telephone heretofore and who he knew used cocaine) to come to the showroom to buy a quarter ounce of cocaine for \$250 (Tr. 44-46, 110-111). At the showroom Lorber introduced Susan Marcus to Shapiro (Tr. 111, 199-200).

Shapiro and Marcus travelled by bus to Union City, New Jersey, where they went to the shoe factory, "Fiesta", where Shapiro introduced her to Mayet (Tr. 112, 200-201). On the way in to Fiesta, Marcus gave Shapiro the \$250 (Tr. 112, 173). Mayet told Shapiro that they would have to go to Puma, and the three of them drove in Mayet's stationwagon to Puma, the retail shoe store in North Bergen (Tr. 114-115, 126, 201-202).

When they arrived at Puma, Mayet told Shapiro that he (Mayet) would have to go to "Maria's" to get the cocaine (Tr. 202-203). Shapiro knew "Maria" to be Marie Aguilar who he had seen and spoken with previously at the shoe store (Tr. 203).* Mayet left Puma for approxi-

* Shapiro testified that Aguilar "hung out" frequently at Fiesta and Puma but did not work there (Tr. 265-66). Shapiro thought Aguilar was Mayet's girlfriend, having seen Aguilar previously at Mayet's apartment and having seen them come together to a party at Shapiro's apartment (Tr. 267-268).

mately an hour and a half (Tr. 116, 123, 204-205). He returned with the cocaine and invited Marcus and Shapiro into a back room, where the three of them sniffed the cocaine together. Then he gave Marcus the package and Shapiro drove her back to New York (Tr. 116-118, 144, 206-207). That night Marcus called Lorber, thanked him, and told him she had gotten the cocaine from Shapiro's partner "Candy" [Mayet] (Tr. 77, 96-97, 102-103, 153, 170, 179-180).

The following Friday, July 6, 1973, Roth spoke with Shapiro on the phone and arranged to purchase three ounces of cocaine the following Monday for \$2250 (Tr. 208-210, 371-372). On Sunday night, July 8th, they agreed on the phone to meet at Lorber's showroom the following day with the package and the money (Tr. 211, 372-373).

On Monday morning, July 9, 1973, Shapiro went to Fiesta. Mayet was not there. Unable to locate Mayet on the telephone either at Puma or Mayet's apartment, Shapiro attempted to reach Marie Aguilar and arranged on the telephone with another Puma employee to have "Maria" call him at Fiesta (Tr. 210-212).*

Shortly thereafter Aguilar called Shapiro (Tr. 212, 275-277). Shapiro told her that he had to meet someone in New York to sell three ounces of cocaine and that he had been unable to get in touch with Mayet who knew about the deal (Tr. 212). Aguilar told him that she had four ounces of cocaine all ready and would meet him with the three ounces he needed at Puma (Tr. 212-213).

Shapiro went from Fiesta to Puma. Aguilar arrived at Puma a few minutes later and told Shapiro she had the package (Tr. 213, 281). Shortly, thereafter Mayet arrived. Mayet and Aguilar went into the back room alone; when they emerged, Mayet had a tinfoil package bulging from

* Shapiro did not have Aguilar's telephone number (Tr. 268).

his front pocket (Tr. 213-215, 279, 283). Mayet, Aguilar and Shapiro proceeded in Mayet's car to New York. As they got into the car, Mayet placed the tinfoil package in Aguilar's pocketbook which was in the front seat between Mayet and Aguilar (Tr. 215-217).

After parking the car in a garage beneath 1411 Broadway, Mayet, Aguilar (with the pocketbook) and Shapiro went up to the 17th floor (Tr. 218, 285). Shapiro alone entered the showroom where he was introduced by Lorber to Roth (Tr. 50, 219). Shapiro brought Roth back outside the showroom to Mayet and Aguilar. After Roth told them that his own partner was at a luncheonette across the street with the money for the deal, the four of them proceeded downstairs together in the elevator and across the street to the luncheonette (Tr. 220-222, 373-376). When Roth's "partner" could not be found, they left the luncheonette. The three men left Aguilar, who was still holding the pocketbook, on one side of the street and proceeded across the street to a public telephone booth where Roth called his "partner", Gregory Korniloff, an agent of the Drug Enforcement Administration (Tr. 222-226, 376-378).*

Roth put Shapiro on the telephone,** and Shapiro and Korniloff agreed to meet at the Market Diner to make the deal. Shapiro so advised Mayet, who then crossed the street and conferred alone with Aguilar. Aguilar handed Mayet the pocketbook, and Mayet gave Aguilar the keys to his car (Tr. 226-228, 378-381).

Mayet, Shapiro and Roth then took a cab to the Market Diner at 43rd Street and 11th Avenue in Manhattan. As they got out of the cab, Mayet handed the pocketbook to

* Korniloff had made arrangements earlier in the day with Roth and Lorber as to how to proceed (Tr. 433, 468, 470).

** This telephone call was received by Korniloff at approximately 3:45 p.m. (Tr. 436).

Shapiro, told Shapiro to watch out for Roth's friend "to see if he was a cop", and told Shapiro that he would wait on the street corner (Tr. 229-230, 257, 381). As Shapiro put his own address book and pack of cigarettes into the pocketbook, he again observed the package of cocaine (Tr. 231-232, 257-258).

Shapiro and Roth proceeded to the front steps of the diner. A few moments later Korniloff appeared, was introduced to Shapiro by Roth, and the three of them went inside the diner (Tr. 231, 233, 382, 438). After discussing the deal briefly at the counter, Shapiro and Korniloff proceeded to the men's room where Shapiro was placed under arrest by Korniloff and other DEA agents and the pocketbook and its contents, including the cocaine, were seized (Tr. 233-236, 382, 439-441).

In the meantime, Mayet was observed pacing on the street corner by two surveillance agents. Mayet looked across the street at the agents, who were watching him from a parked car, and immediately hailed a cab and left the area (Tr. 499-501, 518-521).

Shortly after his arrest, Shapiro told the agents that he had gotten the cocaine from Candy Mayet and his girl-friend "Maria" and that the pocket book was Maria's (Tr. 255-256, 453-454, 493).

The following afternoon, July 10, 1973, Mayet was arrested outside his shoe store in New Jersey. He denied having been in New York City the preceding day. When driven past the Market Diner, Mayet denied ever having been there (Tr. 450-451, 501-502). On July 11, 1973, during the course of a pre-arraignement interview by an Assistant United States Attorney, Mayet said he had last seen Shapiro on the morning of July 9th when Shapiro had left the shoe store on some business and that he, Mayet, had later that day himself gone to Brooklyn on some business (Tr. 451-452).

The evidence further established that the pocketbook (GX 3) seized from Shapiro contained, in addition to the cocaine, women's possessions (Tr. 258-259, 441-442) and a set of keys (GX 5). One of the keys was the key to the letterbox of apartment 18, at 615 Palisades Avenue, Cliff-side, New Jersey, Marie Aguilar's apartment (Tr. 28-30, 445-448).*

Defense Case

Mayet testified in his own behalf (Tr. 564-634). He admitted having used cocaine on various occasions, but maintained that the cocaine had generally been supplied by Shapiro (Tr. 575-576, 597-598, 601, 612). He specifically admitted sniffing cocaine with Shapiro and Susan Marcus in the back room of his shoe store but claimed that Shapiro had supplied the cocaine and given the package to Marcus (Tr. 575, 598-599, 608-611).

Mayet testified that he had had arguments with Shapiro and that he had once fired Shapiro for using cocaine at the store (Tr. 570, 572, 582-583). He claimed that on July 9, 1973, he was coming into New York to get money from his father's accounting office in Manhattan and then to buy wood at a lumber yard and that Aguilar was going to buy leather for the shoe store (Tr. 566, 570-571, 573). At Shapiro's request, they had given him a lift into New York, had gone up to the 17th floor at 1411 Broadway, and met Shapiro's friend (Tr. 573). As it was getting late, Mayet gave Aguilar the keys to his car and took a cab with Shapiro and his friend to the Market Diner. When Shapiro didn't return to the street corner after five

* Shapiro (Tr. 180-365), Lorber (Tr. 32-109), Roth (Tr. 367-405, 425-435), Marcus (Tr. 110-180), Agent Korniloff (Tr. 435-496), and two surveillance agents who had seen Mayet outside the Market Diner (Tr. 499-517 and 518-532) all testified during the Government's direct case. The superintendent of Marie Aguilar's apartment building also testified (Tr. 28-30).

minutes, Mayet said he took a cab to his father's office, got the money he needed, went to the lumber yard, and then took a bus back to New Jersey from the Port Authority (Tr. 573-574, 595, 626-628). Shapiro had the pocket-book during the entire time (Tr. 587-590).

Mayet denied making any statements to the agents when he was arrested (Tr. 576). He attributed his false statements to the Assistant United States Attorney to his experiences under the police state conditions in Cuba, which he had left twelve years previously (Tr. 566, 577-579).

A week after his arrest, Mayet claimed, Shapiro had threatened to testify against him unless he was given money, but Mayet had refused (Tr. 579-580, 596).

Mayet denied having ever sold cocaine or having ever received cocaine from Aguilar (Tr. 572, 586).

Mayet's father testified at trial that Mayet had in fact come to his accounting office in Manhattan on the afternoon of July 9, 1973 for money (Tr. 645).*

Aguilar offered no evidence.

Government's Rebuttal

Kelly testified that on the evening of July 9, 1973, Mayet called Kelly at home and urgently requested a meeting. When they met later that night across the street from Puma, Mayet told Kelly that Shapiro had been arrested and that he would take care of Shapiro so long as Shapiro did not implicate him (Tr. 668-670).

* Mayet also called two character witnesses (Tr. 635-642) and Assistant United States Attorney James Nesland. Nesland testified that Shapiro was released on a \$5,000 personal recognizance bond on July 10, 1973, after he indicated he would co-operate (Tr. 544-546), and that on the day of Shapiro's sentencing the United States Attorney's office would advise the sentencing judge that Shapiro had cooperated (Tr. 560-561).

ARGUMENT

POINT I

Only those exhibits actually admitted into evidence—the handbag and the keys—were sent in to the jury during its deliberations. The jury could properly consider the testimony concerning other contents of the handbag not actually admitted into evidence—testimony which in any event comprised only one small portion of the massive evidence against the defendants.

At trial the Government contended that the handbag seized from Shapiro containing the cocaine had been given to Shapiro by Mayet and to Mayet by Aguilar. The testimony of Shapiro and Roth to this effect was supported by proof that the handbag contained the key to Aguilar's letter box. The defense contended that it was Shapiro's handbag, not Aguilar's, and that the defendants had never touched it.

The handbag and the keys were offered and admitted into evidence (GX 3 and 5; Tr. 447-448).* The other contents of the handbag, including a vast array of women's personal articles, were not themselves offered, although there was testimony concerning several of the articles.

Both appellants contend that the jury's verdict should be set aside as based on matters not in evidence which were improperly displayed during the trial. This contention is clearly without merit.

* The cocaine found in the handbag was also offered and admitted (GX 1B).

Certain contents of the handbag were first displayed in the presence of the jury not by the Government, but by Aguilar's attorney without objection from Mayet, during the cross-examination of Shapiro.* The next testimony concerning the contents of the handbag came during the direct examination of Agent Korniloff, again without defense objection. During this examination, no items were displayed to the jury.**

Finally, during the cross-examination of Mayet, a cigarette case and bracelet from the pocketbook were displayed to Mayet by the prosecutor in the presence of the

* The cross-examination by Aguilar's attorney was as follows:

"Q. . . . Now I want you to look inside this pocketbook here. Mr. Willis [Aguilar's attorney]: May I, your Honor? The Court: All right.

Q. What do you see, women's possessions, hair brushes, cigarettes, lipstick, chewing gum, keys in that handbag, some money, a ring; is that right? A. Yes" (Tr. 258-259).

** Korniloff's testimony was as follows:

"Q. At the time that you seized this pocketbook, was anything in the pocketbook? A. Yes, sir.

Q. What was that, if you recall? A. The cocaine was in it, a brown telephone book, some miscellaneous papers, I think two packs of cigarettes, a cigarette holder, a set of keys, a woman's nylon stocking. That is about all I can recall.

Q. Would you look inside the pocketbook and tell me if, by looking inside, you are able to refresh your recollection with respect to the contents at the time you seized it? A. Yes, sir. There is also some—

Q. Does it refresh your recollection? A. Yes, sir, it does.

Q. Would you close the pocketbook? A. Yes, sir.

Q. Where there other items, if any, in the pocketbook? A. There is some money in there, some brushes, two brushes.

Q. How much money, do you know? A. No, I don't. I think it's a dollar and change" (Tr. 441-442).

jury, again without defense objection, and Mayet admitted never having seen Harry Shapiro wearing the bracelet.*

This was the totality of the testimony concerning the contents of the handbag (other than the cocaine and the keys).**

When, during its deliberations, the jury sent in a note requesting "the handbag and its contents," the prosecutor pointed out that only the handbag and the keys had actually been admitted, and only these items were sent in to the jury (Tr. 774-777).

Aguilar and Mayet cannot complain that items not in evidence were impermissibly sent into the jury during its deliberations, because such items were in fact withheld. Compare *United States v. Burkett*, 480 F.2d 568 (2d Cir. 1973).*** Nor can they complain that the jury impermis-

* The cross-examination of Mayet was as follows:

"Q. You never saw Maria Aguilar with that pocketbook? A. Not that I remember, no. I never had.

Q. Have you ever seen a cigarette case like this? A. I don't smoke.

Q. Have you ever seen a bracelet like this? A. I have, but in a million places.

Q. Have you ever seen that bracelet on Harry Shapiro? A. Not that I remember" (Tr. 633-634).

** During summation, the prosecutor made one reference to the contents of the handbag:

"Is that Harry Shapiro's pocketbook? With the women's articles, the hair brushes, the bracelet, the stocking, the keys, her keys, Marie Aguilar's keys?" (Tr. 731)

*** In *Burkett, supra*, the transmittal to the jury room of items not in evidence, including the defendant's photograph, was found to be harmless error. As was the case in *Burkett*, the contents of the handbag here would have been clearly admissible had they been offered into evidence. Unlike *Burkett*, the contents not actually admitted into evidence were *not* sent to the jury room.

sibly considered the *testimony* (Tr. 258-259, 441-442) concerning the contents of the handbag, because the testimony was unobjected to, was elicited first by the defense and was in any event proper and admissible. Nor, finally, can the defendants complain that the jurors may have seen certain of the handbag's contents during the questioning of witnesses when the first such display was made by one defendant without objection from the other (Tr. 258-259),* particularly where, as here, the jury was cautioned both by the Court ** and by the prosecutor during summation *** to consider only the testimony and the physical exhibits actually in evidence.

Mayet also argues on appeal that he was denied effective assistance of counsel by virtue of the fact that his attorney was not present when the jury's request for the "handbag and its contents" was considered. As only the handbag and keys, which were admitted in evidence, were actually sent in to the jury, no prejudice resulted to Mayet by virtue of his attorney's absence.**** In addition, when

* The subsequent display of the bracelet by the prosecutor during cross-examination of Mayet without objection from either defendant (Tr. 663-664), if improper, must in any event be viewed as *de minimis* in view of the previous testimony concerning the women's possessions, hairbrushes, lipstick, nylon stocking and ring (Tr. 258-259, 441-442). It is unlikely that Mayet's answer to the prosecutor's question would have been different had he been asked if he had ever seen Shapiro use lipstick or wear nylon stockings.

** "Under your oath as jurors you must decide this case without fear or favor and solely as I have said in accordance with the evidence and the law" (Tr. 766).

*** "The evidence consists solely of what you heard the witnesses say from the witness stand and of the exhibits which have actually been admitted into evidence, including the cocaine and the price list and the pocketbook and the keys" (Tr. 713).

**** Mayet argues on appeal that had his attorney been present, he would have requested an instruction that what was not in evidence "not only may not be sent to the jury but could not be

[Footnote continued on following page]

the jury commenced its deliberations, Mayet's attorney sought and obtained leave with Mayet's permission to absent himself and have Aguilar's attorney cover for both defendants if the jury sent in notes (Tr. 771-773). The grant of such permission was clearly proper where, as here, the defendants' interests were identical and the defenses had clearly been prepared together.* See *United States v. Weiss*, 491 F.2d 460, 469-470 (2d Cir. 1974). Cf. *Morgan v. United States*, 396 F.2d 110, 114 (2d Cir. 1968); *Olshan v. McMann*, 378 F.2d 993, 994 (2d Cir.), cert. denied, 389 U.S. 874 (1967); *United States v. Lorano*, 420 F.2d 769, 773 (2d Cir.), cert. denied, 397 U.S. 1071 (1970).**

considered by them" (Mayet Brief, p. 8). Of course, there is no evidence to suggest that Mayet's counsel would have done so, and Aguilar's attorney, then acting for both defendants, made no such request, even though whatever benefit would have been conferred by such an instruction would have redounded equally, to Aguilar's benefit. Moreover, the jury *was* entitled to consider the *testimony* concerning the contents. In any event, the jury had already been instructed by the court to decide the case solely in accordance with the evidence and the law (Tr. 766). See *United States v. Calabro*, 467 F.2d 973, 988-989 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973).

* Mayet acknowledged under cross-examination by the Government that he had spoken with Aguilar's attorney prior to trial (Tr. 611-612), a fact which was apparent from the tenor of his "cross-examination" by Aguilar's attorney (Tr. 580-598).

** Mayet also objects to Judge Wyatt's post-verdict "instruction" to the jury not to discuss what had happened in the jury room (Mayet Brief, pp. 17-20). Notwithstanding Mayet's characterization, Judge Wyatt specifically stated that he was giving no order but merely suggested a course of action for the jury (Tr. 779) that is consonant with public policy considerations regarding insulation of juror's deliberations from public scrutiny and harassment. See *Rakes v. United States*, 169 F.2d 739 (4th Cir.), cert. denied, 335 U.S. 826 (1948); *United States v. Dioguardi*, 492 F.2d 70, 79 (2d Cir. 1974); *United States v. Crosby*, 294 F.2d 928, 950 (2d Cir. 1961), cert. denied *sub nom. Mittleman v. United States*, 368 U.S. 984 (1962); *United States v. Driscoll*, 276 F. Supp. 333 (S.D.N.Y. 1967). No objection was made to Judge Wyatt's recommendation to the jury, nor was there ever any application made by defense counsel for the Court to make any inquiry of the jury.

POINT II

The defendants were not denied due process as a result of the testimony of Shapiro, Kelly, Lorber, Roth and Marcus.

Mayet also claims on appeal that he was denied due process in view of the fact that the major witnesses against him were either awaiting sentence in the same case (Shapiro and Kelly), awaiting prosecutive action for their own activities (Susan Marcus) or eligible for reductions of sentences which had previously been imposed in connection with separate offenses (Lorber and Roth).

The claim is clearly frivolous. Mayet could have been convicted on the uncorroborated testimony of a single accomplice. *Carminetti v. United States*, 242 U.S. 470 (1917); *United States v. Phillips*, 426 F.2d 1069 (2d Cir.), cert. denied, 400 U.S. 843 (1970). The testimony of Shapiro, Kelly, Marcus, Roth and Lorber was more than sufficient. Aguilar and Mayet had sufficient opportunity to cross-examine the witnesses as to their motivations and, indeed, the witnesses were cross-examined extensively on this point.* In addition, Judge Wyatt gave the customary and approved instruction to the jury to weigh accomplice testimony with great caution and scrutiny (Tr. 763). *United States v. Tyers*, 487 F.2d 828, 831 (2d Cir. 1973); *United States v. Marks*, 368 F.2d 566 (2d Cir. 1966), cert. denied, 386 U.S. 933 (1967); *United States v. Mattio*, 388 F.2d 368 (2d Cir.), cert. denied, 390 U.S. 1043 (1968).

* Tr. 56-57, 60, 64-66, 69, 71-73, 93-95, 99 (Lorber); Tr. 129-133, 135-135, 147-148, 160-163 (Marcus); Tr. 385, 387-403, 425-430 (Roth); Tr. 249-255, 263, 292-294, 298, 301, 335-336 (Shapiro); Tr. 671-672 (Kelly). In addition, defense counsel brought the point home further through the testimony of Assistant United States Attorney Nesland (Tr. 544-546, 560-561) and argued the point extensively in openings and summation (Tr. 22, 24-26, 680-682, 686-690, 698, 700-701, 706).

Moreover, Mayet's assertion that the entire government case rested on the testimony of those "coerced" witnesses flies in the fact of the testimony of the surveillance agents who observed Mayet outside the Market Diner, of Mayet's false exculpatory statements on the day of his arrest and the following day in the United States Attorney's office, and Mayet's own damaging admissions and inherently incredible testimony at trial.

Mayet's further assertion that he was denied due process because the sentencing of Shapiro and Kelly was delayed until after the trial and because Roth and Lorber were eligible for reductions of sentence is simply incorrect as a matter of law. *United States v. Insana*, 423 F.2d 1165, 1168-1169 (2d Cir.), cert. denied, 400 U.S. 841 (1970); *United States v. Scheffer*, 463 F.2d 567, 572 (5th Cir.), cert. denied, 409 U.S. 984 (1972); *United States v. Sherwood*, 435 F.2d 867, 868 (10th Cir. 1970), cert. denied, 402 U.S. 909 (1971).*

* Aguilar also takes exception on appeal to Judge Wyatt's brief explanation to the jury of the purposes of the Comprehensive Drug Abuse, Prevention and Control Act of 1970 (Tr. 743). Aguilar cites no authority in support of her claim of "plain error", nor do we perceive any. Compare *United States v. Ramos*, 268 F.2d 878 (2d Cir. 1959), where the references of both the trial judge and the prosecutor to the social consequences of illicit narcotics trafficking were upheld. See also *United States v. Greenberg*, 445 F.2d 1158, 1162 (2d Cir. 1971).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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*United States Attorney for the
Southern District of New York,
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of America.

DON D. BUCHWALD,
JOHN D. GORDAN, III,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

723
Don D. BUCHWALD being duly sworn,
deposes and says that he is employed in the office of the
United States Attorney for the Southern District of New York.

That on the 23rd day of August
he served ~~two~~ copies of the within BRIEF
by placing the same in a properly postpaid franked envelope
addressed:

Thomas H. O'Rourke, Esq.
299 Broadway
New York, N.Y. 10007

Halibuton Tales, Esq.
14 Wall Street
New York, New York 10005

And deponent further says that he sealed the said envelope
and placed the same in the mail drop for mailing
in the United States Courthouse, Foley Square,
Borough of Manhattan, City of New York.

Don D. BUCHWALD

Sworn to before me this

23rd day of August, 1974
Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commissioned in New York County
Commission Expires March 30, 1976